BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICKY D. FRY Claimant	)	
VS.	)	
REECE CONSTRUCTION CO. INC. Respondent	)	Docket No. 259,952
AND	)	
BUILDERS ASSN. SELF-INS. FUND Insurance Carrier	)	

ORDER

Claimant appealed Administrative Law Judge Brad E. Avery's Award dated September 27, 2002. The Board heard oral argument on April 8, 2003.

APPEARANCES

Randy S. Stalcup of Wichita, Kansas, appeared for the claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument before the Board, the parties agreed the August 19, 2002 deposition of Mary Lou Reece was a part of the evidentiary record.

ISSUES

The Administrative Law Judge (ALJ) found claimant entitled to varying percentages of work disability from the September 7, 2000 date of accident until April 15, 2002, when respondent offered claimant an accommodated position. After that date claimant was limited to his 17 percent functional impairment because, upon his attempted to return to work for respondent, he failed a drug screen test.

Claimant argues respondent's delay in offering accommodated employment is indicative of bad faith, made only to reduce claimant's compensation and should not prevent an award of work disability after the delayed offer was extended. Claimant further argues Dr. Lynn D. Ketchum's impairment rating should be disregarded because it included a rating for the neck.

Respondent agrees the ALJ's Award correctly determined that claimant's ultimate award would be calculated based upon his 17 percent functional impairment. But respondent argues the ALJ's analysis was flawed because there should not be any periods of work disability. Respondent argues claimant was offered accommodated employment at a comparable wage in March 2001 upon his release from medical treatment. Because claimant did not attempt such accommodated work, respondent argues the comparable wage should have been imputed to claimant and, consequently, claimant should be limited to his functional impairment from that date.

The sole issue for Board review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant suffered repetitive trauma injuries to his upper extremities each and every working day beginning in approximately April or May 2000. The parties stipulated to an accident date of September 7, 2000, which was claimant's last day worked before surgery.

On September 8, 2000, claimant had bilateral carpal tunnel release performed by Dr. Andy E. Walker. After surgery, EMG studies were indicative of a successful decompression of the carpal tunnel with normal conduction of the median nerves into the hands. On February 12, 2001, the claimant was released from medical treatment for his bilateral arm complaints without any work restrictions.[1] But the doctor was also treating claimant for injuries he had suffered in a non-occupational motor vehicle accident and the doctor did not release claimant to return to work until March 23, 2001.

After claimant was released from medical treatment for his work-related injury, he contacted Mary Lou Reece sometime in March 2001 to inquire about his job status. Claimant was told he had a job and was asked if he was capable of returning to work. At

[1] Walker Depo., Ex. 1.

that time the claimant did not feel he could return to work because he was still receiving treatment for injuries suffered in the motor vehicle accident.

Mary Lou Reece, respondent's president, told claimant that as soon as he received a release or felt he could return to work he should call and he would be put back to work.[2] She further testified claimant never called. When she received Dr. Ketchum's report she then sent claimant a letter dated April 15, 2002, again offering claimant accommodated employment within the doctor's restrictions. Claimant failed a drug screen test and was unable to attempt a return to work for respondent.

The claimant had a variety of medical problems unrelated to his employment with respondent and he applied for and began receiving Social Security disability benefits sometime after Dr. Walker released him to return to work. Claimant also described a variety of part-time jobs he obtained until he received the written offer to return to work for respondent. But he admitted that he did not seek full-time employment because of the negative effect it would have on his Social Security disability. Claimant agreed that it would not be to his advantage to return to full-time work.

Because claimant's injuries constitute an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e (Furse 2000).[3]

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[2] Reece Depo. at 12.

[3] See *Pruter v. Larned State Hospital*, 28 Kan. App. 2d 302, 16 P.3d 975 (2000) *aff'd* 271 Kan. 865, 26 P.3d 666 (2001); *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, for purposes of the wage loss prong of K.S.A. 44-510e(a), the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages . . . .[6]

The Kansas Appellate Courts have further interpreted K.S.A. 44-510e to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[7] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[8] Likewise, employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[9]

Claimant argues that he is entitled to a work disability because respondent's written offer was not made in good faith since it was not made until April 15, 2002. This argument overlooks the fact that in March 2001 respondent told claimant to call when he felt he was

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] Id. at 320.

[7] *See, e.g., Oliver v. Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[8] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[9] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

able to return to work and an accommodated job would be provided. Claimant did not deny this conversation occurred. Notwithstanding the March 2001 offer of accommodated employment, the claimant made no attempt to return to work for respondent until after he received the written offer. And claimant agreed that he would not return to full-time work because of the negative effect on his Social Security disability.

The Board finds claimant did not make a good faith effort to return to offered accommodated employment. The ALJ made the same finding but based his determination upon the written offer of employment. The Board concludes the offer of accommodated employment was made in March 2001 and consequently the ALJ's Award should be modified to reflect claimant is limited to his functional impairment after he was released from treatment by Dr. Walker in March of 2001. The ALJ adopted the functional impairment rating of his court ordered independent medical examiner, Dr. Ketchum, and concluded claimant had suffered a 17 percent permanent partial functional impairment to the body as a whole. The Board finds no reason to disturb that decision.

The modification of the ALJ's Award to eliminate any periods of work disability does not modify the calculation of benefits as the ALJ's Award was ultimately based upon the 17 percent functional impairment. The ALJ noted:

> The Workers Compensation Board has adopted a method of award calculation that gives respondent credit for "weeks paid" and provides no additional compensation after the percentage of permanent partial disability changes and the weeks of permanent partial disability in the new rating are less than what had previously been awarded. See *Wheeler v. Boeing* 25 Kan. App.2d 632 (1998). Also relevant, "The extent of permanent partial disability shall not be less than the percent of functional impairment." K.S.A. 44-510e. Because the longest period of disability is that equal to an award based upon claimant's functional impairment, and it constitutes the minimum amount which can be awarded, claimant's award shall be calculated based upon 69.43 weeks of permanent partial disability.[10]

AWARD

WHEREFORE, it is the finding, of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 27, 2002, is modified to reflect claimant did not establish entitlement to any periods of work disability because he was offered accommodated employment in March 2001, and is affirmed in all other respects.

IT IS SO ORDERED.

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[10] Award at 3.

Dated this _____ day of October 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director